Nos. 16 and 18

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 16

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL., *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL., *Appellees*

No. 18

ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR THE SEVENTH JUDICIAL CIRCUIT OF ARKANSAS, ET AL., *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL., *Appellees*

Appeals from the United States District Court for the Western District of Arkansas

REPLY BRIEF FOR THE APPELLANTS

JAMES E. YOUNGDAHL
ROBERT D. ROSS
711 West Third Street
Little Rock, Arkansas 72201
Attorneys for the Appellants (16)

JOE PURCELL
ATTORNEY GENERAL OF ARKANSAS

LESLIE EVITTS
CHIEF ASSISTANT ATTORNEY GENERAL OF ARKANSAS
Justice Building
Little Rock, Arkansas 72201
Attorneys for the Appellants (18)

Of Counsel:
JOHN P. SIZEMORE
McMATH, LEATHERMAN, WOODS & YOUNGDAHL
POPE, PRATT, SHAMBURGER, BUFFALO & ROSS
Little Rock, Arkansas

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

CITATIONS

Nos. 16 and 18

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 16

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL., *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL., *Appellees*

No. 18

ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR THE SEVENTH JUDICIAL CIRCUIT OF ARKANSAS, ET AL., *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL., *Appellees*

Appeals from the United States District Court for the Western District of Arkansas

REPLY BRIEF FOR THE APPELLANTS

Only if garrulity and guile replace reason and response is the Brief for Appellees addressed to the controlling principles of this case: (1) the record reveals no change in Arkansas railroading sufficient for reversal of repeated

validation of the state full crew laws, and (2) judicial veto of a legislative choice between conflicting economic contentions is no longer constitutionally appropriate.

A.

The railroads seek to evade the thirty year principle of judicial abstention from challenges to legislative decisions on economic issues by rigid characterization.

> However, it has been *held many times* that the *only* consideration on which these laws can be sustained is their purported contribution to *safety*. . . . *Of course,* it has *long been settled* that the validity of these laws turns on the question of their contribution to *safety alone.*

Brief for Appellees at 31, 38.[1] Not only are such statements unsupported and unsupportable by citation; they are belied by the preoccupation of the railroad argument with the *economics* of the industry.

This Court has not found particular characterizations of state business regulations corrosive of its constitutional policy. The "safety" of Oklahoma eyeglass wearers was a factor in the legislative decision validated in *Williamson v. Lee Optical,* 348 U. S. 483 (1952). The state requirement of paid time off for voting must have been considered a kind of "featherbedding" by Missouri employers. See *Day-Brite Lighting, Inc. v. Missouri,* 342 U. S. 421 (1962). An implicit allegation that an old statute was unresponsive to modern economics was rejected by *Olsen v. Nebraska,* 313 U. S. 236 (1941).[2]

---

[1] In quotations from the Brief for Appellees, where emphasis appears it has been added.

[2] It should be recalled that Arkansas voters reaffirmed the full crew laws less than ten years ago. See DX 2.

Expression of one reason for a statute does not preclude its constitutional validation for another. See *McGowan v. Maryland,* 366 U. S. 420 (1961). Concern about "hamstringing labor relations" (A. 1206) is inconsistent with legislative latitude upheld in *Lincoln Federal Labor Union v. Northwestern Iron Co.,* 335 U. S. 525 (1949).

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Nor are we willing or able to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.* The . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State. . . .

Ferguson v. Skrupa, 372 U. S. 726, 731-32 (1963). (Emphasis added.)

B.

The railroads attempt to "bootstrap" their newest challenge over past validation of the Arkansas statutes by overinterpreting a procedural holding:

> This Court in fact settled the applicable legal principles when it rejected the Brotherhood's claim that those constitutional challenges raised by the carriers were insubstantial. . . .

Brief for Appellees at 2.

A threshold question in *Brotherhood of Locomotive Engineers v. Chicago, R. I. & Pac. R. R.,* 382 U. S. 423 (1966),

concerned the applicability of 28 U. S. C., § 1253 (1964) procedures for a three judge court and direct appeal. A few weeks before, in *Swift & Co. v. Wickham,* 382 U. S. 111 (1965), a claim of federal preemption was held insufficient to invoke such procedures.

Because of the existence of other constitutional allegations, the *Wickham* principle was deemed inapplicable. "*Whatever the ultimate holdings on the questions may be* we cannot dismiss them as insubstantial on their face." 382 U. S. at 427. (Emphasis added.) This careful procedural holding, rather than eliminating past decisions of this Court on the Arkansas statutes, inferentially reaffirms them.[3]

The teaching of the last full consideration of Arkansas full crew laws, *Missouri Pac. R. R. v. Norwood,* 283 U. S. 249 (1931), persists. Commerce and equal protection clause challenges are over, absent evidence of new conditions which in relevant respects are distinct from commerce and classification allegations of earlier cases. In arguing here about slowing trains at state lines or switching over the same crossings as exempt companies, for example, the railroads fail to present *any* evidence of *differences* between current conditions and those contemporary to the opinions which dealt expressly with these arguments. *Chicago, R. I. & Pac. Ry. v. Arkansas,* 219 U. S. 453 (1911); *St. Louis, I. M. & S. Ry. v. Arkansas,* 240 U. S. 518 (1916); *Southern Pac. Co. v. Arizona,* 325 U. S. 761, 779 (1946).

By *Norwood* and the 1966 decision in this case, a limited area of judicial inquiry is presented by the pleadings.

---

[3] In his statement of the development of the case, Mr. Justice Black noted: "The pleadings therefore, *at least to some extent,* presented factual issues calling for the introduction and determination of evidence under prior holdings of this Court." 382 U. S. at 427. (Emphasis added.)

The railroads might meet their burden of proving due process infirmity if they established that changed conditions have materially reduced the quantum of danger against which the laws protect, *and* a corresponding development with respect to cost of compliance. *Missouri Pac. R. R. v. Norwood*, 13 F. Supp. 24, 25 (W. D. Ark. 1933). Failure of proof as to the first allegation is clear. See Brief for the Appellants at 26-44, 48-55. Failure of proof as to the second is overwhelming. See Brief for the Appellants at 44-48.

C.

The most brash assertion of the railroads is the repeated statement that accident statistics "conclusively demonstrate" "beyond a doubt" that there is no connection between the statutory crew and safety. See, *e. g.*, Brief for Appellees at 29, 65. Directly to the contrary are a lengthy statistical presentation by the brotherhoods, testimony of the railroad statistician on cross examination, and strong conclusions in recent government publications. See Brief for the Appellants at 48-53.

The railroads continue to argue that *casualties per ton mile or per train mile* have not indicated a safety problem since the reduction of operating crews beginning in May, 1964. The argument defies standard statistical techniques reflecting substantially reduced exposure of human beings (*e. g.*, the operating crews themselves, nonoperating personnel, passengers, etc.) during that period. See A. 469-80; Brief for the Appellants at 52, n. 40. Almost ignored are sharp differences in rates of accidents and especially collisions—that accident most responsive to crew size—before and after the national crew reductions, and between railroads grouped in accordance with size of crews. See, *e. g.*, A. 453-58; IX 50-53.

The railroads claim that reporting techniques are responsible for the awesome rise in railroad accidents without regard, for example, to factors which make accidents *less* reportable now than in pre-1964 periods. See A. 483-87; LX 65.[4] The most authoritative answer to the cavalier dismissal by the railroads of their accelerating safety problem as "merely" reflecting "an increase in the number of mishaps falling within the reporting requirements of the Interstate Commerce Commission" comes from federal administrators. On April 10, 1968, the National Safety Transportation Board of the Department of Transportation released a statement which began:

> The National Transportation Safety Board's review of data covering the last several years for train accidents shows *progressively* worsening trends in *rates, occurrences, deaths, and damage.* Furthermore, and especially disturbing, many train accidents in recent years have involved hazardous or poisonous materials, resulting in fires, or the escape of poisonous or hazardous materials followed by evacuation of populated areas. The latter collateral factors, coupled with a rising accident rate, increase the probability of catastrophic occurrences.
>
> Total train accidents [excluding train-service and non-train accidents] increased from 4,149 in 1961 to 6,793 in 1966, up 63.7%, and according to preliminary figures increased to 7,089 in 1967, up 71% over 1961. Train accidents per million train-miles increased from 158 to 214, or by 35.4% . . . .
>
> *The railroad accident picture is extremely serious. Furthermore, higher speeds, longer and heavier trains, and the growing carriage of deadly and haz-*

[4] Even the distorted railroad "statistics" reveal many indicia of correlation between larger operating crews and safer operation. See listing in Brief for the Appellants at 52, n. 40.

ardous materials may well increase the already serious consequences of unsafe practices.

(Emphasis added.)[5]

D.

Railroad argument about the duties of firemen and brakemen appears to be generated only by its "mammoth advertising campaign which made every American aware of the word 'featherbedding' and its connotations." Thoms, *The Vanishing Fireman—A Case Study in Compulsory Arbitration*, XIV Loyola L. Rev. 125 (1967). The *record* here offers no support for such excesses as:

> The development of the diesel locomotive and other related developments since that time have *completely eliminated any constructive functions* performed by firemen.
>
> . . . .
>
> The evidence *clearly* shows that because of technological and related developments the third brakeman and the third helper today make *virtually no contribution* to safety of operations.

Brief for Appellees at 102, 101.

The record is replete with evidence of "constructive functions" performed by firemen on contemporary Arkansas railroads, organized generally into maintaining the motive power, lookout, relief, inspection, and emergency duties. See Brief for the Appellants at 26-34. In the face of repeated listings of dozens to hundreds of specific regular duties performed by the fireman, in his own right

---

[5] See Brief for the Appellants at 50, n. 38. Late figures show continuation of the alarming trend. The preliminary listing of train accidents for the first seven months of 1968 total 4,608, as contrasted to the total for a comparable period in 1967 of 4,187. FRA F 6180-27 (Dept. of Transp. 1968).

and as a helper to the engineer, repetition here seems unnecessary. See, *e. g.*, the detailed listing at A. 1014-18.

As to some typical specifics, the railroads flatly deny any causal relationship between hazardous slack action and crew size. Brief for Appellees at 31-32. Yet they argue that engineers operating alone can stop trains to correct malfunctions which would have been corrected while running by firemen, and it is undisputed that slack action most commonly occurs during the starting and stopping of trains. See Brief for the Appellants at 28. It is asserted that carelessness of motorists, not of the train crew, is the chief villain in crossing accidents. Brief for Appellees at 33. The claim is understandable for attorneys who defend damage suits against railroads, but is contradicted by extensive testimony at bar about specific instances in which the presence of a fireman *and* an engineer prevented or ameliorated a crossing tragedy. See Brief for the Appellants at 32-34.

None of the administrative tribunals whose reports on manning issues the railroads believe so important found that "any constructive functions performed by firemen" have been "completely eliminated." The railroad quotation from Arbitration Award No. 282 excluded its *very first conclusion*:

> 1. The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work.

PX 20, 41 Lab. Arb. 673, 687 (1963). See Brief for Appellees at 86.

Duties of brakemen (also called "helpers" in yard crews, or switchmen) have been litigated three times. Yet

again the railroads argue that the train crewmen required by the Arkansas statutes "make virtually no contribution to safety of operations."

The only viable theory under which the brakeman challenge could be successful this fourth time requires proof of changes in function. But railroad evidence and argument merely reurge the rejected contentions.

As a specific example, the railroads announce: "When a train is inspected by members of a train crew, it is simply a visual operation and can be performed by one man." Brief for Appellees at 35. Not only does this state the obvious. It is a fact that has been true for decades and considered in all previous full crew challenges. If it is relevant to modern differences, it indicates that *more* crewmen are necessary, as trains are considerably longer now than at the times of previous cases. See A. 1182.

The investigative agencies did not conclude that the third brakeman is useless. For example:

> The only conclusions we may derive from available data are that judgments vary considerably among operating people concerning the adequacy of crew size and that the problem of overmanning, to the extent it exists, varies greatly from carrier to carrier . . . . Some yard service crews, for example, now consist of one foreman and one brakeman, while others consist of one foreman and as many as ten brakemen. The variation depends on a great complex of factors . . . .

PX 20, Arb. Award No. 282, 41 Lab. Arb. 673, 694 (1963). This careful evaluation is at odds with the "complete" "obvious" and "undoubted" conclusions the railroads now urge on this Court.

E.

The length and organizational style of the railroad brief make its inaccuracies difficult to catalog. A few samples may suffice.

On page 43 of the Brief for Appellees the railroads state:

> Improvement in signal equipment has included installation of automatic block signal and centralized traffic control, installation of radio equipment for communication between cabooses, engines and base stations, and *adoption of safety devices such as hotbox detectors, dragging equipment detectors, broken flange and loose wheel detectors, slide detectors and high water detectors.*

The record simply does not support this claim. See Brief for the Appellants at 37-44.

Particularly, as to hotbox detectors in Arkansas, Missouri Pacific has three, St. Louis-San Francisco has two, and two other appellees have *none.* Int. 101 in PX 82, 83, 84, 87, 89. As to dragging equipment detectors, Missouri Pacific has one and the other four appellees have *none.* Int. 114 in PX 82, 83, 84, 87, 89. As to broken flange detectors, Missouri Pacific has one, and the other four appellees have *none.* Int. 112 in PX 82, 83, 84, 87, 89. There is nothing in the record from which actual operation of loose wheel detectors, slide detectors, or high water detectors can be ascertained.

On page 103 of the Brief for Appellees the railroads state:

> It is thus an *admitted and firmly established fact* that the redundant employees required by the Arkansas statutes impose a cost burden of $7,600,000 per year.

It is incredible that the railroads should claim such "admission." See Brief for the Appellants at 44-48. The

only figures in the record from which true cost can be ascertained, furnished by one appellee, show only that the reduction of crewmen beginning in 1964 in other states, as contrasted to their retention in Arkansas, made little or no difference in the cost per mile for the operating crew. A. 1184-87. In all other respects, the railroads failed to adduce proof bearing on the cost ratios commanded by *Missouri Pac. R.R. v. Norwood, supra,* 283 U.S. at 255.

On page 5 of the Brief for Appellees the railroads state:

> Although the Brotherhood of Locomotive Engineers, the Order of Railway Conductors, and the Switchmen's Union of North America joined in the Motion to Intervene, *these organizations did not call any witnesses* to support the statutory requirements. Since *conductors and engineers are the senior members of the crews operating trains in freight and yard service, and would continue as members of such crews in the absence of the statutory requirements,* the silence of the organizations representing such employees is difficult to understand if the statutes in question make any contribution to safety of operations.

From the Motion to Intervene filed in 1964, through two decisions of the District Court and one decision of this Court, the five national operating brotherhoods have participated jointly through identical counsel, evidence, and arguments. The suggestion of significance in the fact that the witnesses called for all five intervenors presently belong to only three of the five organizations (Brief for Appellees at 48) falls in the face of common legal practice and the dominant Arkansas organizational structures of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen. See Register of Rep. Labor Orgs., Vol. 4, at 2-3 (Dept. of Labor 1964).

A more relevant inaccuracy is the intimation that witnesses for the intervenors were not competent or disinterested enough to evaluate the safety of enginecrew and traincrew operation. In fact, of the thirty-six operating employees who testified on behalf of the five brotherhoods, twenty-two are qualified and promoted engineers, eleven of whom work regularly in that capacity; ten witnesses are qualified and promoted conductors, seven of whom work regularly in that capacity. A. 312 *et seq.*, 378 *et seq.*; IX 1-27, 29-35. If, as the railroads argue, the opinions of engineers and conductors are most significant since they remain whatever the outcome of this litigation may be, available testimony gives authoritative support to the conclusion that safety is promoted by Arkansas full crews.

On page 5, n. 1, of the Brief for Appellees the railroads state:

> Furthermore, the Brotherhood of Locomotive Engineers *concedes the correctness of the judgment of the District Court and* has declined to join in this appeal (see letter of Counsel for Appellants to Honorable John F. Davis, dated October 30, 1967).

This quotation is a most blatant effort of the railroads to employ the political disaffection between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen as support for an anti-full crew position. See Thoms, *The Vanishing Fireman—A Case Study in Compulsory Arbitration*, XIV Loyola L. Rev. 125, 159-60 (1967).

The sole and complete basis for the "concession" alleged by the railroads read as follows:

> Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, I hereby state that the Brotherhood of Locomotive Engineers, one of the intervenors below, has decided not to participate in this

appeal. I am not sure exactly how Rule 10, paragraph 4, applies in this situation, but as attorney for the Brotherhood of Locomotive Engineers I can represent their position to be in accordance with what I have stated. You may note that on the Notice of Appeal I have omitted the name of this organization as an appellant.

The particular discrepancy is not vital to the outcome of the case. It *is* representative of railroad argument on major issues as well.

Respectfully submitted,

James E. Youngdahl

Robert D. Ross
711 West Third Street
Little Rock, Arkansas 72201
Attorneys for the Appellants (16)

Joe Purcell
Attorney General of Arkansas

Leslie Evitts
Chief Assistant Attorney General
of Arkansas
Justice Building
Little Rock, Arkansas 72201
Attorneys for the Appellants (18)

Of Counsel:

John P. Sizemore
McMath, Leatherman, Woods & Youngdahl
Pope, Pratt, Shamburger, Buffalo & Ross
Little Rock, Arkansas